No. 92-912

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

IN THE MATTER OF: STEVE D. THOMPSON TRUCKING, INC.,

Debtor,

PRIMROSE OIL CO., INC.,

Petitioner,

vs.

STEVEN D. THOMPSON TRUCKING, INC. and BILLY R. VINING, TRUSTEE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the District Court commit error when it granted summary judgment to the plaintiff in the instant case? *Suggested answer: Yes.*

II. Did the District Court err when it refused to grant the defendant's motion to stay the proceedings and to refer the question of the reasonableness of the plaintiff's rates to the Interstate Commerce Commission when, the District Court relied upon the decision of this Court in *Maislin Industries, U.S. Inc. v. Primary Steel, Inc., Inc.*, 496 U.S. __, 110 S. Ct. 2759 (1990), 111 L. Ed. 2d 94 (1990) when the District Court granted summary judgment to the plaintiff? *Suggested answer: Yes.*

III. Should the decision of the United States Court of Appeals for the Fifth Circuit in *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, __ U.S. __, 110 S. Ct. 3254, 111 L. Ed. 2d 763 (1990) be distinguished from those cases in which the issue of the reasonableness of a carrier's rate is the issue as opposed to the deceptive practices of a motor carrier which was the factual situation before this Court when it rendered its decision in *Supreme Beef? Suggested answer: Yes.*

IV. Did the United States Court of Appeals abuse its discretion when it rendered its decision in this proceeding below, on procedural as opposed to substantive rules? *Suggested answer: Yes.*

V. Did the United States Court of Appeals abuse its discretion when it refused to grant the appellant's petition for reconsideration? *Suggested answer: Yes.*

LIST OF PARENT COMPANIES AND SUBSIDIARIES

None.

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No.

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IN THE MATTER OF: STEVE D. THOMPSON TRUCKING, INC.,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Pursuant to Rules 12.1, and 14 of the Rules of the Supreme Court of the United States, Appellant, Primrose Oil Company, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit

entered on July 31, 1992, and its decision as a result of the Petition for Rehearing on August 27, 1992, and should exercise such jurisdiction herein.

The decisions and opinions of the United States Bankruptcy Court, the United States District Court, and the United States Court of Appeals for the Fifth Circuit are included herein as Appendices, as well as copies of a Petition to Proceed Nunc Pro Tunc before the District Court.

STATEMENT OF JURISDICTION

This appeal arises from an action to recover alleged payment of undercharges by the Trustee, Billy R. Vining for the Debtor, Steve D. Thompson Trucking, Inc. The Judgment of the Bankruptcy Court for the United States District Court for the Western District of Louisiana was filed on November 12, 1991, in Case No. 89BK-12113, and No. 89BK-12115 filed on December 18, 1991. A timely Notice of Appeal was filed in the United States Court of Appeals for the Fifth Circuit on January 17, 1992. Due to an administrative error in the Clerk's Office for the Bankruptcy Court, and in addition for the United States District Court for the Western District of Louisiana, two separate case numbers were assigned as a result of the Bankruptcy Adversary Proceeding specifically, numbers 89BK-12113 and 89BK-12115 in the Bankruptcy Court and 91-2542 and 91-2565 in the District Court. The one case concerned the underlying cause of action, and the second case concerned the fixing of interest. The appellant filed a Petition for Leave to Proceed Nunc Pro Tunc in the Bankruptcy Court, and the District Court granted the Petition. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, § 1254 (1).

Cases that sustain the jurisdiction of this Court include *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 496 U.S. __,

110 S. Ct. 2759 (1990), 111 L. Ed. 2d 94 (1990), and *Cooper v. Delaware Valley Shippers*, 949 F.2d 107 (1991), 91-1496.

STATUTES INVOLVED

The petitioner respectfully prays this Court to review the issue of the reasonableness of the motor carriers rates, pursuant to the provisions of 49 U.S.C. § 10741, and the action by the Fifth Circuit Court of Appeals in dismissing the appellant's appeal on procedural grounds, with reference to the provisions of F.R.C.P. 60(b)(2) and the decisions of this Court in *Thompson v. Immigration Service*, 375 U.S. 384, 84 S. Ct. 397, 11 L. Ed. 2d 404 and *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S. Ct. 283, 9 L. Ed. 2d 261.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows: The plaintiff was a motor carrier who solicited the defendant's business by representing that they could provide various transportation services, and when the defendant advised the plaintiff that its rates were unreasonably high, and not competitive, and therefore, that it would only tender the freight if the plaintiff offered the defendant competitive rates, the plaintiff agreed to do so. Based upon the plaintiff's representations that he was offering competitive rates, and filed the necessary tariffs, the defendant agreed to do business with the plaintiff. The plaintiff in fact picked up the defendant's shipments, billed the defendant in accordance with the agreed upon rates, and the defendant paid the plaintiff in due course. The plaintiff subsequently filed for bankruptcy, the Trustee audited the defendant's freight bills, and brought this action for alleged undercharge monies owed. The defendant has

refused to pay the plaintiff pursuant to numerous decisions of this Court, and the provisions of 49 U.S.C. § 10701(a) which requires that the plaintiff's rates must be reasonable.

REASONS FOR GRANTING THE WRIT

This appeal presents important and substantial questions, as herein described, in that the bankruptcy judge refused to stay the instant proceeding and refer the issue of rate reasonableness as set out at 49 U.S.C. § 10701(a) to the Interstate Commerce Commission under the Doctrine of Primary Jurisdiction as decided by this Court in its decision in *United States v. Western P.R. Co.* 352 U.S. 59, 77 S. Ct. 161, L. Ed. 2d 126.

In addition, this case concerns the failure by the Fifth Circuit Court of Appeals to file the decision of this Court in *Thompson, ibid.*

The issue of staying the proceedings and referring the question of rate reasonableness is an issue about which there is considerable confusion and difference in decisions among the District Courts and the United States Courts of Appeals, *see Delta Traffic Service, Inc. v. Transtop, Inc.*, 902 F.2d 101 (lst Cir. 1990); *Delta Traffic Service v. Georgia-Pacific Corp*, 936 F.2d 64 (2nd Cir. 1991); *Delta Traffic Service v. Occidental Chemical*, 846 F.2d 911 (3rd Cir. 1988); *Cooper v. Delaware Valley Shippers (In Re Carolina Motor Express, Inc.)*, 949 F.2d 107 (4th Cir. 1991); *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d. 388 (5th Cir 1989), *cert. denied*, __ U.S. __, 110 S. Ct. 3254, 111 L. Ed. 2d 763 (1990); *Orr v. ICC*, 912 F.2d 119 (6th Cir. 1990); *Western Transp. Co. v. Wilson and Co.*, 682 F.2d 1227 (7th Cir. 1982); *Atlantis Exp. v. Standard Transp. Services*, 955 F.2d 529 (8th Cir. 1992); *Horn's Motor Exp., Inc. v. Harrisburg Paper Co.*, 765 F. Supp. 211 (M.D. Pa. 1991); *Overland Exp., Inc. v. International Multi Foods*, 765 F. Supp. 1386 (1990), *Bergquist v. LaSalle-Deitch Co. (In Re Sharm*

Express, Inc.), 127 B.R. 620 (D. Minn. 1991).

The instant case should be reviewed by this Court or all proceedings should be stayed until this Court renders a decision in *Cooper v. Delaware Valley Shippers, ibid,.* for the following reasons:

1. The issue that was before the Courts below is the same issue that is before this Court in *Cooper v. Delaware Valley Shippers, ibid.*, and if this Court were to deny the appeal in this action the defendant would be irreversibly harmed, as judgment would be entered against it, and it would have no recourse, as the judgment would be final against the instant appellant.

2. In the event that this Court concludes in *Cooper, ibid.*, that a Bankruptcy Court should stay a proceeding and refer the issue of rate reasonableness to the Interstate Commerce Commission under the Doctrine of Primary Jurisdiction in *Cooper, ibid.*, the appellant will be irreversibly harmed if this case is not stayed, as the decision denying the appeal will be final and the appellant will be required to pay a judgment for which there is no legal basis.

3. The Court of Appeals abused its discretion in denying the instant appeal. The District Court which had the record before it and the record of the assignment of case numbers, granted the Petition by the appellant to proceed *nunc pro tunc*. Certainly, a party is prohibited from proceeding with an appeal until a case is final, and the case in the District Court was not final until the court had finished affixing damages in the form of interest. However, the Court of Appeals without any argument of any kind summarily dismissed the appellant's appeal allegedly due to appellant's failure to make a timely filing in the District Court and refused to reconsider its decision even though the appellant cited a decision from this Court and the Fifth Circuit, clearly indicating its authority to do so. It should also be noted, that neither party raised

the issue of the timeliness of the appeal to the District Court from the Bankruptcy Court in their briefs to the Court of Appeals, and the plaintiff in the action before the District Court did not oppose the Petition to Appeal *Nunc Pro Tunc*: therefore, for the Court of Appeals to summarily dismiss the appeal without any consideration of the reason why the district judge granted the Petition *Nunc Pro Tunc* is clearly an abuse of discretion in direct conflict with *Thompson, ibid.*, and FRCP 60(b)(2). In addition, the appellant filed a Petition for Reconsideration requesting the right to brief the issue of the timeliness of the appeal to the District Court, and the Court of Appeals summarily dismissed the Petition.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument for their resolution, and that in the alternative, that this Court should stay all proceedings in this matter until this Court has rendered its decision in *Cooper v. Delaware Valley Shippers, ibid.*

Respectfully submitted,

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APPENDIX A – OPINION OF BANKRUPTCY JUDGE CALLAWAY CASE NO. 89BK-12113

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

NO. 89BK-12113

IN RE: STEVE D. THOMPSON TRUCKING, INC.

NO. 91AP-1047

BILLY R. VINING, TRUSTEE

VERSUS

PRIMROSE OIL CO., INC.

REPORT AND RECOMMENDATION

This matter came before the Court on the Motion for Summary Judgment filed by the trustee, Billy R. Vining, against defendant, Primrose Oil Co., Inc. (hereinafter referred to as "Primrose" or "defendant"). A hearing was held on the Trustee's Motion for Summary Judgment on October 2, 1991 wherein this Court stated that it would issue a Report and Recommendation containing proposed findings of fact and conclusions of law pursuant to Bankruptcy Rule 9033(a). The Court indicated following the conclusion of the argument on the Motion for Summary Judgment that it would recommend the Trustee's Motion for Summary Judgment be GRANTED IN PART AND DENIED IN PART.

Appendix A

The Court has utllized the Report and Recommendation process (or proposed Fiindings of Fact and Conclusions of Law) as required by Bankruptcy Rule 9033(a) because the Court is presently of the opinlon that the jurisdiction it exercises is that granted by 28 USC 157(c)(1).

PROCEDURAL HISTORY AND FACTUAL FINDINGS

The Court finds the following factual procedural history of this matter. On August 30, 1989, Steve D. Thompson Trucking, Inc. (hereinafter referred to as the "debtor" or "Thompson") filed for relief under Chapter 11 of the Bankruptcy Code. The case was subsequently converted to one under Chapter 7 of the Bankruptcy Code on October 5, 1989 at which time Billy R. Vining was appointed trustee of the debtor. The trustee filed this adversary proceeding against the defendant, Primrose, on March 20, 1991, seeking to collect freight undercharges.

The debtor provided interstate transportation services to defendant at negotiated rates below the rates in applicable published tariffs. After the trustee was appointed he caused a post-petition audit of the books and records of the debtor to be undertaken. That audit discovered undercharges on previous freight bills to the defendant. The defendant was billed for the difference, it refused to pay and the trustee instituted the adversary proceeding to collect the claimed undercharges.

The trustee accompanied his Motion for Summary Judgment with two affidavits in support of the motion, one of Charles E. Shinn, a freight bill auditor and analyst, and the other by Billy R. Vining, the trustee, together with a Memorandum in Support of the Motion for Summary Judgment, all filed on August 9, 1991. The defendant filed a response to the Motion for Summary Judgment

together with an affidavit of Byron Falk. The affidavit of Mr. Falk alleged that tariffs not utilized by Mr. Shinn in his affidavit were applicable. In response to the defendant's position, the trustee filed a supplemental memorandum wherein he addressed the defenses raised by Primrose. For the reasons hereinafter stated the Court finds that none of the tariffs set out by Mr. Falk in his affidavit are applicable to the shipments of defendant. The Court further finds that the affidavit of Mr. Falk did not point out specific material facts over which there was a genuine dispute and therefore the plaintiff was entitled to summary judgment.

The Court finds from the affidavits filed that the books and records of the debtor indicated that the defendant paid plaintiff originally for each of the freight bills sued upon in the amounts shown on the original freight bill, but that those original freight bills and the discounts shown thereon were not based upon valid and filed tariffs with the Interstate Commerce Commission. The 450 audited freight bills and the amounts due shown thereon in the attachments to Mr. Shinn's affidavit correctly show, in principle, the additional amounts due on each freight bill under tariffs lawfully filed with the Interstate Commerce Commission. The shipments were in Interstate Commerce when carried by the debtor pursuant to a bill of lading for each freight bill which was then corrected by Mr. Shinn. The defendant paid the original billing amount acknowledging receipt of the shipment. The facts described in the affidavits of Mr. Shinn and Mr. Vining were not controverted by the affidavit of Mr. Falk and are therefore accepted by the Court. Based upon these affidavits, the Court finds that the principal sum of $9,060.28 is due from Primrose to the plaintifrf.

As to the tariffs set out by Mr. Falk in his affidavit, the Court finds that factually and legally none are applicable to the shipments made for this defendant.

Appendix A

DISCOUNT TARIFF 104

Discount Tariff 104, as shown by its face sheet, was effective June 27, 1987. A number of the charges shown in Plaintiff's Motion or Summary Judgment occurred prior to that date. Furthermore all of the items under this tariff which were referenced by Mr. Shinn require under their general provisions the following to be applicable:

> "[2] THE DISCOUNT IN THIS ITEM APPLIES ONLY WHEN THE SHIPPER AND/OR CONSIGNEE IS NOTIFIED BY THE CARRIER THAT IT IS A PARTICIPANT IN THIS ITEM. THE NOTIFICATION FORM WILL SPECIFY THE ORIGIN(S) AND/OR DESTINATION(S) FROM AND/OR TO WHICH THE DISCOUNT WILL APPLY.
>
> [3] THE NOTIFICATION FORM REQUIRED IN [2] MUST BE SIGNED BY THE CARRIER'S DIRECTOR OF TRAFFIC AND AN AUTHORIZED SALES REPRESENTATIVE OF THE CARRIER.
>
> [4] THE MINIMUM CHARGE FOR A SINGLE SHIPMENT SHALL BE PROVIDED IN THE SECTION OF ITEM 300 OF THIS TARIFF SPECIFIED IN THE NOTIFICATION FORM."

The defendant provided no proof that it was a participant under the abovestated provisions of Discount Tariff 104. It provided no notification form which was signed by the debtors

Director of Traffic and an authorized sales representative of the debtor. Therefore, the defendant did not participate in Discount Tariff 104.

DISCOUNT TARIFF 100

The discounts allowed under this tariff only apply pursuant to its general provisions in paragraph [1] on shipments "handled jointly with Southeastern Freight Lines, Inc. and interchanged in Atlanta, GA. and then only when the discount is shown on the freight bill at the tlme of interchange." There is no factual allegation whatsoever by defendant that any of the shipments were handled jointly with Southeastern Freight Lines, Inc.; the freight bills themselves attached to plaintiff's Motion for Summary Judgment show no such interline. Indeed the vast majority of the freight bills are between Louisiana and Texas and obviously would not be interchanged in Atlanta, Georgia. There is no evidence whatsoever that there was any interchange in Atlanta, Georgia or that Southeastern Freight Lines, Inc. jointly handled the shipments at issue. Accordingly, THST 100 is not applicable to defendant's shipments sued upon.

CONCLUSIONS OF LAW

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Bankruptcy Rule 7056 provides in part:

> "The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and

that the moving party is entitled to judgment as a matter of law."

The Court finds that considering the pleadings and affidavits and attachments thereto filed, there is no genuine issue as to material fact and that plaintiff is entitled to judgment as a matter of law.

A defendant resisting summary judgment must point out specific facts showing that there is a genuine dispute. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202, 217 (1986). Summary judgment is an integral part of the Federal Rules of Civil Procedure; it is not a disfavored procedural shortcut. It is "designed" to secure the just, speedy and inexpensive determination of every action. *Cellotex v. Corporation vs. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265, 276 (1986).

Recently in *Haislin Industries U.S. Inc. vs. Primary Steel Inc.*, 497 U.S. __, 110 S.Ct. 884, 111 L.Ed.2d 94 (1990) the Supreme Court reaffirmed its longstanding precedent that neither the Interstate Commerce Commission nor an agreement between a shipper and a carrier could absolve the shipper of the requirement to adhere to the carrier's filed tariff.

The carrier's filed tariff rates are presumed reasonable. *Haislin*, supra; *Louisville & N.R.R. vs. Maxwell*, 237 U.S. 94 (1915); *Arizona Grocery vs. Atchinson, T & S.F.R.*, 384 U.S. 370, 384. The defendant alleged as an affirmative defense in its answer and in oral argument on the Motion for Summary Judgment that the rates sought to be collected are not reasonable. The issue of rate reasonableness does not constitute a defense to an action to collect freight charges. The reparations remedy set by statute provides the

sole and exclusive remedy for claimed excessive charges. *Mohasco Industries, Inc. vs. Acme Fast Freight, Inc.*, 491 F.2d 1082, 1084 (5th Cir. 1974), cert. den., 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70 (197a); *United States vs. Associated Transport, Inc.*, 505 E.2d 366, 370 (D.C. Cir. 1974). Furthermore, before a shipper may challenge the reasonableness of a carrier's rate, it must first pay the full tariff rate and then commence an action for reparations under the statute. *Matter of Caravan Refrigerated Cargo. Inc.*, 864 F.2d 388, 391 (5th Cir. 1989), cert. den.___U.S. ___, 110 S.Ct. 3254, 111 L.Ed.2d 763 (1990). The Court finds it noteworthy that certiorari was denied in *Caravan* four days *after Maislin* was decided. Even if the unreasonableness of the debtor's rates would have been a defense in this action, Primrose completely failed to show that there existed any issue of material fact concerning the reasonableness or the applicability of the rates in the tariffs utilized in reaching the amount of the undercharges. The Third Circuit Court of appeals recently noted, in a case such as the matter at bar, primary jurisdiction cannot be invoked by mere pleading:

> We remind counsel that phrasing an issue as a matter of tariff construction or as a question of reasonableness does not determine the issue of primary jurisdiction. *Western Pacific R.R.*, 352 U.S. at 68-69. As the Supreme Court noted to hold otherwise would make the doctrine of primary jurisdiction an abstraction to be called into operation of the whim of the pleader." *Id.* at 69.

Delta Traffic Service vs. Occidental Chemical, 846 F.2d 911 (3rd Cir. 1988) n.7.

In a comparable case, the United States Supreme Court held that once a tariff becomes effective, any nullification of that tariff

can only act prospectively. *ICC vs. American Trucking* Associations. Inc., 467 U.S. 354, 104 S.Ct. 2458, 81 L.Ed.2d 282 (1984). It is a necessary corollary of that position that rulings on the reasonableness of rates may also be made only as to their prospective application. *Matter of Caravan Refrigerated Cargo, Inc.*, supra. The ICC concurs, given its own concession as stated above, and given the prospective tenor of its regulations on proceedings before it and in compliance with ICC decisions. 49 C.F.R. Chapter X, Subchapter B, Sec. 1101.1 et seq.

It is well settled that the burden of proving an existing rate ot be unreasonable is upon the shipper. *Central of Georgia R.R. Co. vs. United Clay Procedures Tariff Assn.*, 379 F.Supp. 976, 978 (D.D.C. 1974) aff'd 421 U.S. 957 (1957). This burden remains upon the shipper even if a carrier presents no evidence regarding the reasonableness of its rates. At not time has defendant even alleged any *factual* evidence concerning the reasonableness of rates plaintiff seeks to assess.

The defendant failed to present any relevant evidence concerning the unreasonableness of the rates sought to be collected; it failed to raise any issue of material fact regarding rate reasonableness and therefore that affirmative defense cannot be considered.

The defendant also raised certain "equitable defenses" in its answer and in oral argument such as estoppel, laches and the like.

The United States Supreme Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & N.R.R. vs. Maxwell*, 237 U.S. 94, 97 (1915) the Court said:

Appendix A

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the *only* lawful charge. *Deviation from it is not permitted upon any pretext.* (Emphasis added)

In *Armour Packing Co. vs. United States*, 209 U.S. 56, 81 (1908), the Court announced the following rationale for this rigid rule:

> If the rates (filed and published as required by law) are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

The Supreme Court and the Circuit Courts of Appeals have applied this rule of law every time they have addressed the issue of "equitable" defenses to adherence to lawful common carrier rates. See, e.g., *Thurston Motor Lines vs. Jordan K. Rand.*, 460 U.S. 533 (1983), (carrier awarded differences between agreed upon "contract rates" and published rates), *Illinois Central Gulf R.R. Company vs. Golden Trianale Wholesale Gas Company*, 586 F.2d 588, 592 (5th Cir. 1978) (estoppel defense rejected, storage charges in tariff applied despite repeated assurances by carrier that they would not apply); *Nyad Motor Freight, Inc. vs. W.T. Grant Co.*, 486 F.2d 1112, 114 (2nd Cir. 1973) (filed rate applied despite non-filed contract of parties to apply lower rate); *Inman Freight Systems, Inc. vs. Olin Corp.*, 807 F.2d 117, 121 (8th Cir. 1986) (filed rate doctrine applied even when there has been intentional or inadvertent misquotation of rates and the estoppel defenses not available in a suit for undercharges where a carrier misquotes rates); *Chicago V & R Co. vs. Readv Mix Concrete Co.*, 487 F.2d 1263, 1267 (8th Cir. 1973); *Bower & Dudley vs. Knox Glass, Inc.*,

390 F.2d 193, 196 (3rd Cir. 1968); and *Norfolk & Western R. Co. vs. American Comp. St. Corp.*, 181 F.2d 183, 184 (6th Cir. 1950).

The "filed rate doctrine" is so absolute that a claim for relief from the filed rate cannot even be predicated on a carrier's alleged fraudulent or intentional misquotation of rates. Additionally, as a matter of law, the shipper is conclusively presumed to know the terms of the tariff, and, therefore, cannot claim deceit or false representation when the rate charged is at a variance with the tariff provisions. *Paulson vs. Greyhound Lines. Inc.*, 628 F.Supp. 888 (D.Minn.), aff'd 804 E.2d 506 (8th Cir. 1986).

There is no prohibition contained in the law or the Interstate Commerce Commission regulations against the publication of motor carrier rates for a named shipper. 49 C.F.R. 1312.14(a)(c) provides "Rates may be published to apply from or to a named plant site, construction site, or other site, if its location is identified. Rates may be published for the account of a specifically named shipper or receiver." This provision was enacted by the Interstate Commerce Commission in 1964 in, *Rates For A Named Shipper Or Receiver* Ex Parte No. MC-158, 367 ICC 959, 1984 Fed. Car. Cases 37,088.

The Courts precluded assertion of either estoppel or a claim for fraud where the result would be a rate preference. *Missouri Pacific R.Co. vs. Rutledge Oil Co.*, 669 F.2d 557, 559 (8th Cir. 1982). In fact, in each instance where fraud or unfair practice was alleged by the shipper as either a defense or in the form of a counterclaim, the courts have consistently refused to recognize such a cause of action.

In *Pettibone vs. Richardson*, 126 F.2d 969 (7th Cir. 1942), in defense of an action for collection of undercharges, the defendant pleaded a counterclaim alleging that he had been damaged by the failure to the plaintiff to post the proper rates and by the negligence

of plaintiff's agents in furnishing the incorrect rates to the defendant. The court refused to recognize such an action, reasoning that:

> It is clear that the Defendant, having sold the livestock on the cost-plus basis, has suffered a loss, but the decisions are definite to the effect that under the present state of facts the railroad is not liable for this loss. To allow the Defendant to recover would, in substance allow the railroad to grant a rebate (Citations omitted). The failure of the railroad to post tariffs in this station does not alter the rule. (Citations omitted).
>
> . . . The defendant is conclusively presumed to know the proper rates. (Citations omitted). Therefore, the Defendant has no right to rely on the railroad's quotation of rates, and no failure of duty on the part of the railroad renders it liable for Defendant's loss. Although the Defendant's counterclaim relied upon the rates quoted by the railroad company, which were incorrect, he must not only pay the correct rates to the railroad company, but he is without remedy against the railroad company for the damage he may have suffered in reliance upon the incorrect rates quoted. He is bound to pay the correct rates, and what the correct rates are he is bound to know.

Id. at 970.

Appendix A

In *F. Burkhart Mfg. Co. vs. Fort Worth & D.C. Ry. Co.*, 149 F.2d 909 (8th Cir. 1945), the appellate court, in affirming the lower court's decision to award the carrier undercharges due and dismissing the defendant's defense and counterclaim, stated that the defendant:

> . . . was charged with knowledge of the lawful rate, and that . . . it became obligated as a matter of law to pay any uncollected balance of the freight charges, regardless of any acts or omissions of the carrier. [And] *one who was conclusivelv presumed and legally bound to know the tariff rate, cannot be heard to say that it was deceived or damaged bv false representations about the rate.* (Emphasis supplied).

Id. at 910.

In *Consolidated Freightways vs. Terrv Truck, Inc.*, 612 F.2d 465 (9th Cir. 1980), the Ninth Circuit reached the same result. Consolidated Freightways, a motor carrier, filed suit against Terry Truck, for alleged undercharges. Terry Truck counterclaimed, alleging that the carrier knowingly misquoted the applicable shipping rate. The Court dismissed the counterclaim for failure to state a cause of action, holding that "no claim for relief can be predicated on a carrier's alleged fraudulent misquotation of tariffs." *Id.* at 466.

In *Aero Truckinq, Inc. vs. Reaal Tube Co.*, 594 F.2d 619 (7th Cir. 1979), Aero, an interstate motor carrier, sued Regal for certain freight undercharges. Regal claimed that Aero fraudulently misrepresented the applicable freight charges and therefore was

estopped from collecting said charges. In addition, Regal filed a third party complaint against an employee of the carrier who allegedly quoted the incorrect rate. Regal claimed that if it was found liable to Aero, then it was entitled to a judgment against the employee. With respect to Regal's affirmative defense, the Court held that estoppel was not a defense for an action for freight charges. Although the Court acknowledged that Regal may not have employed Aero if it had been aware of the actual tariff charges, it noted that this was true in all undercharge cases. The Court also dismissed Regal's action against Aero's employee holding that since Regal is conclusively presumed to know the tariff rate, no sult can be predicated upon Regal's reliance on Aero's employee's erroneous statements regarding the tariff rate. *Id.* at 623.

The debtor also sought prejudgment interest on its claim. The Court finds that the law is well settled that in a tariff undercharge case the plaintiff is entitled to prejudgment interest as a mandatory element of damages. *Louisiana & Arkansas Railway Co. vs. Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966); *Southern Pacific Transportation Co. vs. San Antonio, Tex.*, 748 F.2d 266, 274 (5th Cir. 1984).

With respect to the computation of such interest, in this case there is a material issue of fact. Accordingly, a hearing has been set for November 20, 1991, at 1:30 p.m. to consider evidence presented with respect to the issue of the amount of interest accumulated on this claim.

CONCLUSION

Based on the foregoing discussion, it is the recommendation of this Court to the District Court that the Motion for Summary

judgment filed by Billy R. Vining, Trustee, be granted in part and denied in part and that there be judgment in this adversary proceeding in favor of Billy R. Vining, Trustee of Steve D. Thompson Trucking, Inc. and against defendant, Primrose Oil Co., Inc., in the principal sum of $9,060.28, together with interest on each freight shipment as determined at the hearing on November 20, 1991, together with the costs of court in this proceeding of $120.00.

Pursuant to Bankruptcy Rule 9033(b) failure of the parties to request reconsideration and to file specific written objections with the Clerk of Court within the delays set forth in Bankruptcy Rule 9033 will result in a judgment in accordance with this Report and Recommendation being ordered by the District Court.

IT IS SO ORDERED.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 8 day of Nov. , 1991.

s/ Stephen V. Callaway
STEPHEN V. CALLAWAY
CHIEF JUDGE, U. S. BANKRUPTCY COURT

COPY SENT:
DATE; 11/12/91
BY: TD
TO: PER ATTACHED

Appendix A

Notice sent to:

Michael E. Kramer
604 Kinloch St. Winnsboro,
LA 71295

Joseph T. Bambrick Jr.
529 Reading Ave.
West Reading, PA 19611

Louis D. Smith
P.O. Box 8032
Monroe, LA 71211-8032

Stephen J. Katz
411 S. Washington St.
Bastrop, LA 71220

E. Eugene Hastings
P.O. Drawer 2808
Monroe, LA 71207-2808

Steve D. Thompson Tr
P. O. Box 149
Winnsboro, LA 71295

Primrose Oil Co., In
c/o John Brin
11444 Denton Dr.
Dallas, TX 75229

APPENDIX B — OPINION OF BANKRUPTCY JUDGE CALLAWAY CASE NO. 89BK-12115

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA

NO. 89BK-12115

IN RE: STEVE D. THOMPSON TRUCKING, INC.

NO. 91AP-1047

BILLY R. VINING, TRUSTEE

VERSUS

PRIMROSE OIL CO., INC.

ORDER

The above Joint Motion to Fix Interest having been considered:

IT IS ORDERED that the report and recommendation issued in connection with this matter be and it is hereby amended to recommend that there be judgment in favor of Billy R. Vining and against the defendant, Primrose Oil Co., Inc., in the principal sum of Nine Thousand Sixty and 28/100 ($9,060.28) Dollars, together with interest accumulated thereon through June 5, 1990, in the total amount of One Thousand Two Hundred Fifty-one and 70/100 ($1,251.70) Dollars, and interest on the principal balance of $9,060.28 at the rate of 5.5% per annum from June 5, 1990, until paid.

THUS DONE AND SIGNED in Monroe, Louisiana, on this, the 18 day of December, 1991.

Appendix B

s/ Stephen V. Callaway
JUDGE

APPROVED AS TO FORM:
s/ E. Eugene Hastings
E. Eugene Hastings

s/ Louis D. Smith
Louis D. Smith

ATTEST: A TRUE COPY
DATE: 12-18 1991
CLERK OF COURT
BY: s/ Beckie Absup
Deputy Clerk, U.S. Bankruptcy Court
WESTERN DISTRICT OF LOUISIANA

APPENDIX C — DECISION OF THE HONORABLE DONALD E. WALTER OF THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

BILLY R. VINING, TRUSTEE

VERSUS NO. 91-2542

PRIMROSE OIL CO., INC.

JUDGMENT

The report and recommendation issued by the United States Bankruptcy Court for the Western District of Louisiana in connection with this proceeding having been considered together with the joint motion to fix interest and the order approving the said joint motion to fix interest and the order approving the said joint motion, no timely objection to the said report and recommendation having been made;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in this adversary proceeding in favor of Billy R. Vining, Trustee of Steve D. Thompson Trucking, Inc. and against defendant, Primrose Oil Co., Inc., in the principal sum of Nine Thousand Sixty and 28/100 ($9,060.28) Dollars, together with interest accumulated thereon through June 5, 1990, in the total amount of One Thousand Two Hundred Fifty-one and 70/100 (&1,251.70) Dollars, and interest on the principal balance of Nine Thousand Sixth and 28/100 ($9,060.28) Dollars at the rate of 5.5% per annum from June 5, 1990, until paid.

Appendix C

THUS DONE AND SIGNED in Monroe, Louisiana, on this, the 23 day of December, 1991.

s/ illegible

Entered 12/30/91
Brenda Bellyhall
Katy Bambrick
Kramer Bk Ct.
Hastings US Tr.
Smith Judge Calloway

APPENDIX D — ORDER GRANTING PETITION TO FILE NOTICE OF APPEAL NUNC PRO TUNC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

No. 91-2542
No. 91AP-1047

BILLY R. VINING, TRUSTEE

vs.

PRIMROSE OIL CO., INC.

ORDER

AND NOW, this 28th day of January, 1992, upon consideration of the Petition for Leave to File a Notice of Appeal *Nunc Pro Tunc* and upon motion of JOSEPH T. BAMBRICK, JR., ESQUIRE, attorney for PRIMROSE OIL CO., INC., IT IS HEREBY ORDERED AND DECREED that leave is hereby granted to PRIMROSE OIL CO., INC. to file its Notice of Appeal with regard to the above cases.

BY THE COURT:

s/ illegible

Appendix D

COPY SENT:
DATE 1/30/92
BY dh
TO: COA
Judge Walter
A. Carroll
S.J. Katz
E.E. Hastings
M.E. Kramer
L.D. Smith
J.T. Bambrick Jr.
Bankruptcy Ct.
US Trustee

APPENDIX E — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4114
Summary Calendar

IN THE MATTER OF: STEVE D. THOMPSON TRUCKING, INC.

Debtor,

PRIMROSE OIL CO., INC.,

Appellant,

VERSUS

STEVEN D. THOMPSON TRUCKING, INC., and BILLY R. VINING, TRUSTEE,

Appellees.

Appeal from the United States District Court for the Western District of Louisiana
(91-CV-2542)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges. PER CURIAM:[1]

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1 Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Appendix E

Primrose Oil Company, Inc., appeals an adverse summary judgment on the trustee's action to collect the difference between shipping rates negotiated between Primrose and debtor Steve D. Thompson Trucking, Inc., and the rates filed by Thompson with the Interstate Commerce Commission (ICC). The district court entered judgment in the principal amount of approximately $9,000, together with interest, based on the bankruptcy judge's report and recommendation containing proposed findings of fact and conclusions of law pursuant to Bankruptcy Rule 9033(a).

In 1986, Thompson agreed to provide motor carrier transportation services to Primrose at rates "that would 'meet or beat' existing rates for . . . competing carriers. Thompson, in August 1989, filed or protection under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101 *et seq.;* and the case was converted to a Chapter 7 proceeding, 11 U.S.C. § 701 *et seq.*, that October. The Chapter 7 trustee filed an adversary proceeding in March 1991 against Primrose, seeking to collect the difference between the negotiated and filed rates. Primrose responded, *inter alia,* that the filed rates were unreasonable.

That June, Primrose moved the bankruptcy court to stay the adversary proceeding and refer it to the ICC for a determination of the reasonableness of Thompson's filed rates. The motion was denied that July, and the trustee moved that August for summary judgment. Following a hearing that October, the bankruptcy court announced that it considered the action a non-core proceeding pursuant to 28 U.S.C. § 157(c)(1). Accordingly, it stated that it would issue a report and recommendation with proposed findings and conclusions pursuant to Rule 9033(a), including a recommendation that the trustee's motion be granted.[2]

---

2 The bankruptcy judge recommended that judgment be granted on the principal claim, but that a material fact issue remained on the amount of accumulated

(Cont'd)

Appendix E

The bankruptcy judge issued his report and recommendations in November 1991, with the following standard admonition:

> Pursuant to Bankruptcy Rule 9033(b) failure of the parties to request reconsideration and to file specific written objections with the Clerk of Court within the delays set forth in Bankruptcy Rule 9033 will result in a judgment in accordance with this Report and Recommendation being ordered by the District Court.

As the court clerk noted, the report was mailed to the parties on November 12.[3]

No objections were filed.[4] On December 26, the district court,

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(Cont'd)
interest. In December 1991, the parties filed a joint motion requesting that the report and recommendation be amended to reflect an agreed amount of interest. Primrose emphasized that it did not, however, "in executing this joint motion, admit, concede, or stipulate to the findings of fact and law contained in the report and recommendation, *and reserves any and all rights which it has to object to the findings contained therein.*" (Emphasis added.) As discussed *infra*, however, Primrose never filed objections.

3 "In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1), the bankruptcy judge shall file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket." Bankr. R. 9033(a).

4 Instead, on November 22, Primrose erroneously filed a notice of appeal to the district court from the report and recommendation. The notice states that the appeal was "from the final Order of the Bankruptcy Court entered in this adversary proceeding on . . . November [8,] 1991." The report and recommendation, signed on November 8, was entered on November 12.

noting that it had considered the report and recommendation, with "no timely objection to [it] having been made", entered judgment in favor of the trustee.

Primrose maintains that the district court erred in (1) granting summary judgment for the trustee, and (2) refusing to stay the proceedings and refer the issue of the reasonableness of Thompson's filed rates to the ICC.[5]

Based upon our review of the record, and no objections having been filed to the bankruptcy judge's report, we find no reversible error. Accordingly, the judgment is

AFFIRMED.

---

5 On June 1, 1992, Primrose moved to stay this appeal pending a decision by the United States Supreme Court in *In re Carolina Motor Express, Inc.*, 949 F.2d 107 (4th Cir. 1991), *cert. granted sub nom., Reiter v. Cooper* __U.S.__, 112 S. Ct. 1934 (1992). The Supreme Court will consider the following question: "Does filed rate doctrine mandate that shipper must pay full tariff rate to insolvent carrier in rate undercharge collection before matter may be referred to ICC for determination of reasonableness of those rates?" 60 U.S.L.W. 3768 (U.S., May 19, 1992). This motion was DENIED.

APPENDIX F — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4114

IN THE MATTER OF: STEVE D. THOMPSON TRUCKING, INC., Debtor.

PRIMROSE OIL CO., INC.,

Appellant,

versus

STEVEN D. THOMPSON TRUCKING, INC., and BILLY R. VINING, TRUSTEE,

Appellees.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING

(AUGUST 27, 1992)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Appendix F

ENTERED FOR THE COURT:

s/ illegible
United States Circuit Judge

APPENDIX G — NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

No. 91-2542
No. 91AP-1047

BILLY R. VINING, TRUSTEE

vs.

PRIMROSE OIL CO., INC.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that PRIMROSE OIL CO., INC., by and through its Counsel, JOSEPH T. BAMBRICK, JR., ESQUIRE, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order entered in this action on December 12, 1991, with regard to Case No. 91AP-1047 (91-2565) (Exhibit A hereto) and with regard to the Order of December 23, 1991, with regard to Case NO. 91-2542 (Exhibit B hereto).

BY: s/ Joseph T. Bambrick
JOSEPH T. BAMBRICK, JR., ESQUIRE
Attorney for Appellant
PRIMROSE OIL CO., INC.
529 Reading Avenue
West Reading, Pennsylvania 19611
Phone 215/372-6400
Attorney ID No. 45112

Appendix G

COPY SENT:
DATE 1/30/92
BY dh
TO: COA
Judge Walter
A. Carroll
S.J. Katz
E.E. Hastings
M.E. Kramer
L.D. Smith
J.T. Bambrick, Jr. w/fee Hr
Bankruptcy Ct.
US Trustee

APPENDIX H — PETITION FOR LEAVE TO FILE NOTICE OF APPEAL NUNC PRO TUNC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

No. 91-2542
No. 91AP-1047

BILLY R. VINING, TRUSTEE

vs.

PRIMROSE OIL CO., INC.

PETITION FOR LEAVE TO FILE NOTICE OF APPEAL NUNC PRO TUNC

YOUR PETITIONER, PRIMROSE OIL CO., INC., by and through its Counsel, JOSEPH T. BAMBRICK, JR., ESQUIRE, hereby files this Petition for Leave to File Notice of Appeal *Nunc Pro Tunc* and avers the following:

1. The matters with the above-assigned case numbers arise from a single case in Bankruptcy in this District, No. 89BK-12115.

2. The Clerk's Office of this Honorable Court inadvertently and mistakenly assigned two separate case numbers, specifically 91-2542 and 91-2565, relative to two aspects of this same case when these two aspects came before this Honorable Court,

3. Docket No. 91-2542 related to the fixing of interest in the underlying case.

4. Docket No. 91-2565 related to Bankruptcy Case Nos. 89BK-12115 and 91AP-1047 and concerned the central factual issues to be resolved in this matter.

5. The interests of judicial economy and justice will be served if the two case numbers are consolidated for purposes of appeal to the Fifth Circuit United States Court of Appeals.

6. The time period for filing a Notice of Appeal will shortly expire in one or both cases.

7. Because of the extreme confusion concerning the precise docket numbers in this matter, Petitioner PRIMROSE OIL CO., INC. hereby requests this Honorable Court grant leave to file a Notice of Appeal of the final orders in both cases to the Fifth Circuit, a copy of which proposed Notice of Appeal is attached hereto and made a part hereof.

WHEREFORE, Petitioner PRIMROSE OIL CO., INC. hereby respectfully requests that this Honorable Court grant Petitioner leave to file a Notice of Appeal *nunc pro tunc* for the foregoing reasons.

BY: s/ Joseph T. Bambrick
JOSEPH T. BAMBRICK, JR., ESQUIRE
Attorney for Petitioner
529 Reading Avenue
West Reading, Permsylvania 19611
Phone 215/372-6400
Attorney ID No. 45112

APPENDIX I — MOTION TO STAY PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4114

IN THE MATTER OF: STEVE D. THOMPSON TRUCKING, INC., Debtor.

PRIMROSE OIL CO., INC.,

Appellant,

versus

STEVE D. THOMPSON TRUCKING, INC.,

Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

MOTION TO STAY PENDING DECISION BY THE UNITED STATES SUPREME COURT

1. On January 17, 1992, the defendant filed a notice of appeal in the above matter.

2. The appellant filed its brief in support of its appeal, and the defendant f iled its brief in support of the decision of the District Court.

3. Since that time, the United States Supreme Court has granted review in the case of *Cooper v. Delaware Valley Shippers,*

Appendix I

949 F2d 1 07, CA 4, 60 LW 3768 .

4 . The issue presented in that case is "Does filed rate doctrine mandate that shipper must pay full tariff rate to insolvent carrier in rate undercharge collection before matter may be referred to ICC for determination of reasonableness of those rates?".

5. The very same issue was argued by the appellee in the instant case.

6. The appellant is not aware of a decision having been rendered in the instant case.

7. In the interest of judicial economy and justice for the parties to the instant case, the appellant respectfully prays that the instant case be stayed until the United States Supreme Court renders its decision in *Cooper v. Delaware Valley Shipper,* ibid.

WHEREFORE, for the reasons set out above, the defendant prays this Honorable Court to Stay the instant matter pending decision by the United States Supreme Court in *Cooper.*

Respectfully submitted by,

s/ Joseph T. Bambrick
Joseph T. Bambrick, Jr., Esq.
ATTORNEY FOR APPELLANT
529 Reading Avenue
West Reading, PA 19611
215-372-6400

Appendix I

PROOF OF SERVICE BY FIRST CLAS MAIL

I, Joseph T. Bambrick, Jr., Esq., hereby certify that I served a copy of the Motion to Stay, by First Class Mail on May 29, 1992, to the following:

Michael E. Kramer
604 Kinloch Street
Winnsboro, LA 71295

Louis D. Smith
P.O. Box 8032
Monroe, LA 71211-8032

Stephen J. Katz
411 S. Washington Street
Bastrop, LA 71220

E. Eugene Hastings
P.O. Drawer 2808
Monroe, LA 71207-2808

Steve D. Thompson Trucking
P.O. Box 149
Winnsboro, LA 71295

Date: May 29, 1992

s/ Joseph T. Bambrick
Joseph T. Bambrick, Jr., Esq.
529 Reading Avenue
West Reading, PA 19611
215-372-6400